

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

---

REBECCA L. GOLDSMITH,

Plaintiff,

v.

MEMORANDUM AND ORDER  
05-C-138-S

JOANNE B. BARNHART, COMMISSIONER  
OF SOCIAL SECURITY,

Defendant.

---

Plaintiff Rebecca L. Goldsmith brings this action pursuant to 42 U.S.C. § 405(g) for review of the defendant Commissioner's final decision denying her Disability Insurance Benefits (DIB). She asks the Court to reverse the decision or remand the case for further proceedings.

Plaintiff applied for DIB on January 25, 2001 alleging disability since October 8, 1999 because of myofascial pain syndrome. Her application was denied initially and upon reconsideration. A hearing was held on June 20, 2002 before Administrative Law Judge (ALJ) William S. Herbert. In a written decision dated January 3, 2003 the ALJ found plaintiff not disabled.

Plaintiff requested review of the ALJ's decision. On May 16, 2003 the Appeals Council remanded the case to the ALJ. A second administrative hearing was held on September 12, 2003. In a writ-

ten decision dated January 5, 2004 ALJ Herbert found plaintiff not disabled. The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review on December 30, 2004.

#### FACTS

Plaintiff was born on April 13, 1971. She has a high school education and one year of vocational technical school. She worked in the past as a welder, telephone solicitor, landscape laborer, woodworking shop hand, industrial truck operator, nurse's assistant, checker-cashier and informal waitress.

Plaintiff was diagnosed with myofascial pain in November 1999 and had physical therapy from November 15, 1999 through December 22, 1999. Plaintiff had some trigger point injections which provided her some relief. Plaintiff had an MRI which was negative for thoracic disc syndrome.

In January 2000 Dr. Peter M. Ihle, who treated plaintiff, completed a medical report for plaintiff's employer. He indicated plaintiff had overuse syndrome and myofascial pain of her shoulder and midback. Dr. Ihle concluded that plaintiff was restricted to medium exertional work with only occasional stooping, climbing, crouching, crawling and kneeling with reaching limited to 2/3 normal reaching ability.

Plaintiff saw Dr. F. P. Ekrem in January 2000 for evaluation and management of her pain in her neck and in the interscapular area on the right. At this time plaintiff was taking Vioxx, Flexeril and Naprosyn. Dr. Ekrem diagnosed plaintiff with regionalized myofascial pain syndrome and associated sleep disturbance, stiffness, fatigue and activity intolerance. Dr. Ekrem substituted the medication Baclofen for Flexeril and suggested plaintiff continue to pace herself and to increase the frequency of her stretches.

In February 2000 plaintiff returned to Dr. Ekrem. She told him she was tolerating school pain-wise and was able to get up and walk during the lectures as necessary. She requested permission to ride a motorcycle. Dr. Ekrem advised her that she could ride a motorcycle.

In 2000 and 2001 plaintiff was treated for acute asthmatic bronchitis and chronic allergies. She was prescribed antibiotics, inhalers and a nebulizer. Plaintiff was diagnosed with mild asthma with occasional bronchospasm.

In May 2001 Dr. Baumblatt, a state agency physician, reviewed the record evidence and concluded plaintiff could perform light exertional work but should avoid moderate exposure to fumes, odors, dusts, gases and poor ventilation.

In April 2002 plaintiff saw Dr. Ekrem. She reported that she was no longer attending school but was working part-time in her

home performing medical transcription. Dr. Ekrem completed "Physical Residual Functional Capacity Questionnaire" form indicating that he had seen plaintiff on three occasions, January 2000, February 2000 and April 2002. He diagnosed plaintiff with myofascial pain syndrome and thoracic outlet syndrome. He noted she was taking Flexeril and Amitriptyline.

Dr. Ekrem reported plaintiff was able to sit for forty-five minutes at one time if she was typing but could sit for one and one-half hours if she was not typing for a total of at least six hours. He concluded that plaintiff could stand for forty-five minutes at one time, walk ten city blocks without rest or severe pain and could stand/walk for a total of two hours. Dr. Ekrem concluded that plaintiff needed a job where she could shift positions at will, take unscheduled twenty to thirty minute breaks every thirty to forty-five minutes and be absent at least one day a month. Dr. Ekrem noted plaintiff could rarely lift ten pounds, could never climb ladders, crawl or overhead lift and could only occasionally twist, stoop, crouch and climb stairs. Dr. Ekrem concluded that plaintiff's pain and other symptoms seldom interfered with her attention and concentration and that she was able to tolerate moderate work stress.

On April 19, 2002 Dr. Kirk Lane suggested plaintiff have breast reduction surgery. She decided against having the surgery.

In September 2002 Dr. Claudia Bodway performed a psychological evaluation of plaintiff. She concluded that plaintiff had adjustment reaction with depressed mood.

Dr. Martinson reviewed the record evidence, observed plaintiff's testimony and testified as a medical expert at the first administrative hearing. He testified that plaintiff had myofascial pain of the thoracic spine and right shoulder. He concluded that plaintiff could lift twenty pounds occasionally and ten pounds frequently with occasional stooping, climbing, crouching and kneeling. He further concluded that plaintiff needed to avoid static positions, seldom perform overhead work, never perform repetitive overhead work and change positions every thirty minutes.

At the second hearing before the ALJ on September 12, 2003 plaintiff appeared with counsel and testified concerning her earnings and schooling. She testified that her condition had not changed significantly since her testimony at the June 2002 hearing. At that hearing she testified that she had myofascial pain and thoracic outlet syndromes. She further testified that she had pain across the bra level which goes up into the shoulder and neck to the base of the skull. Plaintiff disagreed with Dr. Ekrem's assessment concerning her ability to sit six hours a day and only miss one day a month. She stated she could only sit 4-5 hours with breaks and would miss four days a month.

Karl Botterbusch, a vocational expert, was present at the hearing and had reviewed the record. The ALJ asked the expert whether an individual with the claimant's age, education, work experience and residual functional capacity could perform any jobs in the regional economy. The ALJ indicated plaintiff retained the residual functional capacity to lift twenty pounds occasionally and ten pounds frequently, needed a sit/stand option after thirty minutes and a position change as needed, could perform a job with no hard requirements for bending, stooping, kneeling, crouching or crawling, could not perform lifting overhead with right arm and could only use right arm for assisting with left-sided overhead work, could not perform repetitive gross or fine manipulations, could sit six hours and stand or walk two hours in an eight hour work day and could not work in an environment with dust, fumes, smoke, chemicals, nitrous gases or extreme cold or humidity.

The expert testified that such an individual could perform plaintiff's past relevant work as a telephone solicitor. He also testified that the hypothetical individual could perform the jobs of surveillance monitor, bottling line attendant and shoe and boot final inspector which numbered 7,200 in the state of Wisconsin and 256,000 in the national economy.

In his January 5, 2004 decision the ALJ noted that pursuant to her request plaintiff's disability period was amended to a closed period from January 25, 2000 to November 1, 2002. He concluded

that plaintiff had severe impairments of myofascial pain syndrome, thoracic outlet syndrome, mild asthma with bronchitis and rhinosinusitis. The ALJ also concluded that plaintiff had an adjustment disorder with depressed mood which mildly impaired in her activities of daily living but unimpaired in her social function. Although he found plaintiff had a mild impairment in concentration, persistence and pace, the ALJ found no incidents of decompensation. The ALJ concluded plaintiff did not have a severe mental impairment.

The ALJ found plaintiff's subjective complaints not fully attributed to insignificant consistencies in the overall record. The ALJ then concluded plaintiff retained the residual functional capacity to lift twenty pounds occasionally and ten pounds frequently, required a sit/stand option after thirty minutes and a position change as needed, could perform a job with no hard requirements for bending, stooping, kneeling crouching or crawling, could not perform lifting overhead with her right arm and could only use her right arm for assisting with left-sided overhead work, could not perform repetitive gross or fine manipulations, could sit six hours and stand or walk two hours in an eight hour work day and could not work in an environment with dust, fumes, smoke, chemicals, nitrous gases or extreme cold or humidity. The ALJ considered Dr. Ekrem's assessment of plaintiff's residual

functional capacity but found the record did not support giving his opinion controlling weight.

The ALJ found that plaintiff's work as a telemarketer was past relevant work, that she could perform this work and was not disabled. In the alternative based on the testimony of the vocational expert, the ALJ found that plaintiff could perform work that exists in significant numbers in the national economy. Accordingly, the ALJ found that plaintiff was not disabled.

The ALJ made the following findings:

1. The claimant was fully insured for Title II disability insurance on October 8, 1999 and is insured through at least December 31, 2004.
2. The claimant was born on April 13, 1971 and is a 31 year old younger individual.
3. The claimant has a high school education and has completed one year of vocational technical school with course in geographic information systems and medical assistant.
4. The claimant has skilled past relevant work as a MIG welder and semi-skilled past relevant work and unskilled past relevant work as a landscape laborer, woodworking shop hand, industrial truck operator, nurse assistant, checker-cashier and informal waitress.
5. The claimant has not engaged in disqualifying substantial gainful work activity.
6. The claimant is severely impaired by a myofascial pain syndrome, thoracic outlet syndrome, mild asthma with bronchitis and rhinosinusitis.
7. The claimant's histories of left ganglion cyst removals, tick bites, skull fracture,



nicotine dependence and adjustment disorder with depressed mood and a history of drug and alcohol abuse are not severe impairments.

8. The claimant's severe impairments do not meet or equal the criteria of any impairment contained in Appendix 1, Subpart P, Part 404.

9. The claimant's subjective complaints are not fully credible due to significant inconsistencies in the overall record.

10. The claimant retains the residual functional capacity to lift 20 pounds occasionally and 10 pounds frequently. She cannot maintain a prolonged static position and requires a sit/stand option after 30 minutes. She should not have hard requirements for bending, stooping, kneeling, crouching or crawling but she requires position change as necessary. She cannot work doing overhead lifting with the right arm and can only use the right arm for assisting with left-sided overhead work. She cannot perform repetitive gross or fine manipulations but has no limitations otherwise on fingering. Sitting is limited to a sedentary exertional level, e.g. 6 of 8 hours with standing and walking for 2 of 8 hours. The claimant should not work in an environment with dust, fumes, smoke, chemicals, noxious gases and extremes of cold and humidity.

11. Considering her age, education, past work history and residual functional capacity claimant can perform her past relevant work as a telephone solicitor.

12. (Same as 11).

13. Alternatively, considering her age, education, past work history and residual functional capacity claimant can perform other jobs that exist in significant numbers in the national economy. This includes 5,100 jobs in Wisconsin as a surveillance systems monitor for which 166,000 jobs exist nationally and 1,800 jobs in the state as a bottling line

attendant with 70,000 jobs nationally and 300 jobs as a shoe and boot inspector for which 20,000 jobs exist nationally.

14. The claimant is not under a disability as defined by the Social Security Act.

#### OPINION

This Court must determine whether the decision of the Commissioner that plaintiff was not disabled is based on substantial evidence pursuant to 42 U.S.C. § 405(g). See Arbogast v. Bowen, 860 F.2d 1400, 1402-1403 (7th Cir. 1988). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971).

Disability determinations are made pursuant to a five-step sequential evaluation procedure. 20 CFR § 404.1520(a)-(f). First, the claimant must not be performing substantial gainful activity. Second, the claimant must have a severe, medically determinable impairment. Third, a claimant will be found disabled if his or her impairment is equal in severity to a listed impairment in 20 C.F.R. Subpart P, Appendix 1. Fourth, if the claimant does not meet the third test, he/she must not be able to perform his/her past work. Fifth, if the claimant cannot perform his/her past work, he or she must not be able to perform any existing jobs available in the national economy given his or her educational background, vocational history and residual functional capacity.

The ALJ found that plaintiff had severe impairments of myofascial pain syndrome, thoracic outlet syndrome, mild asthma with bronchitis and rhinosinusitis but that none of these impairments singly or in combination met or equaled a listed impairment. The ALJ found that plaintiff's subjective complaints were not fully credible based on significant inconsistencies in the overall record. The ALJ concluded that plaintiff was not disabled because she retained the residual functional capacity to perform both her past work as a telemarketer and a significant number of jobs existing in the national economy.

Plaintiff contends that the ALJ did not give Dr. Ekrem's opinion of her residual functional capacity controlling weight. In order to be entitled to controlling weight, a medical opinion must be rendered by a treating source, be well supported by medically acceptable clinical and laboratory diagnostic techniques and not inconsistent with other substantial evidence in the record. See 20 C.F.R. §404.1527(d)(2), Social Security Ruling 96-2p.

The ALJ gave specific reasons why he was not giving Dr. Ekrem's opinion controlling weight. He noted that there is an absence of documented reflex deficiency or sustained strength or sensory changes that would preclude lifting even ten pounds. He also noted that some of plaintiff's activities including driving and prolonged standing are inconsistent with Dr. Ekrem's opinion.

Further supporting the ALJ's decision to discount Dr. Ekrem's opinion is that he saw her only three times and his assessment was not consistent with Dr. Ihle's opinion, the medical expert opinion (Dr. Martinson) or the assessment of the state agency physician (Dr. Baumblatt). Although the ALJ considered Dr. Ekrem's assessment of plaintiff's residual functional capacity he correctly did not give it controlling weight.

Plaintiff also claims that the ALJ did not properly assess her credibility. The ALJ's credibility decision must be upheld unless it is "patently wrong." Powers v. Apfel, 207 F.3d 421, 435 (7<sup>th</sup> Cir. 2000). In his decision the ALJ specifically addressed plaintiff's subjective complaints and concluded that they were not fully credible based on the record as a whole. At pages 9-12 of the ALJ's decision he considers the medical evidence in the record, her treatment and medications, her daily activities and concludes that they are not consistent with the degree of limitation alleged by plaintiff. See SSR 97-7p; Knight v. Chater, 55 F.3d 309, 314 (7<sup>th</sup> Cir. 1995).

An examination of the record supports the ALJ's conclusion that plaintiff's testimony was not wholly credible because it was inconsistent with the overall record. The ALJ's finding that plaintiff was not fully credible is consistent with the law. Donohue v. Barnhardt, 279 F.3d 441 (7<sup>th</sup> Cir. 2002).

Plaintiff also contends that the hypothetical question posed to the vocational expert was incomplete. Specifically, she contends it did not include her mild limitations in daily living in concentration, persistence and pace caused by her affective disorder. It was not necessary for the ALJ to include these limitations in the hypothetical because they were not part of plaintiff's residual functional capacity since she was found not to have a severe mental impairment.

Plaintiff also objects to the use of the phrase in the hypothetical, "no hard requirements for bending, stooping, kneeling crouching or crawling." This phrase correctly reflects that plaintiff could not do much bending, stooping, kneeling, crouching or crawling. The Court finds that the hypothetical question properly included plaintiff's limitations as supported by the record.

Plaintiff also claims that the ALJ improperly found that plaintiff's past work as a telemarketer constituted past relevant work. When remanding the ALJ's first decision, the Appeals Council found that the ALJ had not properly found that plaintiff's telemarketing work was past relevant work. The ALJ reconsidered and again found that it was past relevant work and the Appeals Council affirmed the decision on appeal.

Had this decision been erroneous, the ALJ found in the alternative that jobs existed in significant numbers in the

national economy that plaintiff could perform. This finding supports the ALJ's decision that plaintiff was not disabled at step five of the sequential analysis.

There is substantial evidence to support the Commissioner's finding that plaintiff was not disabled from January 25, 2000 through November 1, 2002 because she could perform jobs existing in the national economy. Accordingly, the Commissioner's decision will be affirmed.

ORDER

IT IS ORDERED that plaintiff's motion to reverse the decision of the Commissioner is DENIED.

IT IS FURTHER ORDERED that the decision of the defendant Commissioner denying plaintiff Disability Insurance Benefits (DIB) is AFFIRMED.

Entered this 26<sup>th</sup> day of September, 2005.

BY THE COURT:

S/

---

JOHN C. SHABAZ  
District Judge